

KENNETH L. HARGETT
Claimant

W. A. DUNBAR

AND

CNA INSURANCE COMPANY

Insurance Carrier

AND

WORKERS COMPENSATION FUND

ORDER

On December 19, 1996, the application of respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge Douglas F. Martin on June 17, 1996, came on for oral argument.

Claimant appeared by and through his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Timothy G. Lutz of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Patrick M. Salsbury of Topeka, Kansas. There were no other appearances.

The record and stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board. In addition, the

Appeals Board acknowledges a dispute exists regarding the admissibility of the evidentiary deposition of Kenneth Hargett taken September 21, 1995.

ISSUES

- (1) Whether the deposition of Kenneth Hargett taken September 21, 1995, should be made a part of the record and considered by the Appeals Board and, if not, to whom the costs for this deposition should be assessed.
- (2) Whether claimant is entitled to be reimbursed for certain medical expenses including \$900 to claimant's spouse for nursing services and \$30 per diem.
- (3) Whether claimant is entitled to future medical treatment.
- (4) The nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The evidentiary deposition of Kenneth Hargett taken September 21, 1995, will not be considered as part of the record for purposes of this decision. At the time the deposition was taken the counsel for the claimant advised the parties that this testimony was being taken as a form of redirect or rebuttal evidence. No request was made to extend claimant's terminal date which had expired. A timely objection was made by respondent to the taking of this deposition and a request was made on the record to assess the costs of the transcript of this deposition to the claimant.

K.S.A. 1997 Supp. 44-523(b) obligates an administrative law judge to set terminal dates for the parties to submit evidence in support of their positions. Claimant is granted 30 days from the date of first full hearing with the respondent being granted 30 additional days thereafter. Extension of the terminal dates may be granted:

- (1) If the employee is being paid temporary or permanent total disability compensation;
- (2) for medical examination of the claimant . . .; or
- (3) on application for good cause shown.

It is obvious the parties did not agree to an extension. Claimant was not being paid temporary or permanent total disability compensation and no medical examination was

requested of the claimant. The only criteria to be considered would be for good cause shown. However, no application was ever filed with the Director to extend claimant's terminal date and good cause to extend claimant's terminal date was never argued to the Administrative Law Judge. Therefore, the deposition taken September 21, 1995, outside of claimant's terminal date will not be considered.

K.S.A. 44-555 allows all or any part of a reporter's fee to be assessed against any party in the proceeding. In this instance, as the deposition of September 21, 1995, was not a part of the record, it shall be the obligation of claimant to pay the court reporter's fees for this transcript in the amount of \$126.80.

With regard to claimant's request for \$900 to cover the expenses associated with the care and maintenance of Kenneth Hargett, the Appeals Board finds that claimant has failed in his burden of proving entitlement to these funds. There is no evidence to support a finding that this service provided by claimant's wife was reasonable and necessary medical care under K.S.A. 1989 Supp. 44-510 or vocational rehabilitation under K.S.A. 1989 Supp. 44-510g. As such, the Appeals Board finds claimant's request for reimbursement of \$900 payable to his wife, Ruth Hargett, should be denied. However, the request for an additional \$30 as unpaid per diem is supported by the evidence and will be granted.

The Appeals Board awards claimant future medical treatment upon proper application to and approval by the Director and an unauthorized medical allowance up to the statutory maximum upon presentation of an itemized statement verifying same.

With regard to the nature and extent of claimant's injury and/or disability, the Appeals Board finds that the Award of the Special Administrative Law Judge should be modified.

Significant dispute exists regarding whether or not claimant has the ability to perform work in the open labor market and to earn comparable wages pursuant to K.S.A. 1989 Supp. 44-510e. There is substantial evidence that shows claimant has a significant injury and is entitled to a substantial work disability. However, the evidence does not support a finding of permanent total disability. Michael Dreiling, claimant's vocational rehabilitation expert, stated that based upon Dr. Nathan Shechter's restrictions, claimant would have a 60 to 70 percent loss of access to the open labor market. Edwin Gaddis, respondent's vocational expert, felt that claimant was capable of performing substantial and gainful employment based upon the restrictions of both Dr. Shechter and Dr. Robert J. Takacs. Respondent acknowledged at regular hearing that claimant's work disability ranged from 78 to 81 percent when considering both the ability to perform work in the open labor market and to earn comparable wages as required by K.S.A. 1989 Supp. 44-510e. Claimant's expert, Mr. Dreiling, testified that claimant is permanently and totally disabled and not able to realistically work in the labor market.

The Appeals Board, in considering the totality of the evidence, finds that claimant has suffered a substantial work disability but is capable of performing work in the open labor market and earning an entry level wage. In considering the substantial injury suffered by claimant, the opinions of Mr. Dreiling and Mr. Gaddis, the medical evidence in the record, and claimant's limited educational background and capacity for formal training, the Appeals Board finds claimant has suffered a 90 percent permanent partial disability to the body as a whole as a result of the injuries on May 9, 1990.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Douglas F. Martin dated June 17, 1996, should be, and is hereby, modified and an award of compensation is hereby made in accordance with the above findings in favor of claimant and against the respondent, its insurance carrier, and the Kansas Workers Compensation Fund for a 90% permanent partial general disability to the body as a whole. Claimant is entitled to 149 weeks temporary total disability compensation at the rate of \$271 per week in the amount of \$40,379 followed by compensation at the rate of \$271 per week for a total award of \$100,000.

As of December 23, 1997, claimant would be entitled to 149 weeks temporary total disability compensation at the rate of \$271 per week in the sum of \$40,379 followed thereafter by 220 weeks permanent partial disability compensation at the rate of \$271 per week in the sum of \$59,621 for a total award of \$100,000 all of which is due and owing and ordered paid in one lump sum minus any amounts previously paid.

Claimant is entitled to future medical upon proper application to and approval by the Director.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Claimant is denied reimbursement for the \$900 spousal nursing services requested.

Claimant is granted an additional \$30 as per diem.

The fees necessary to defray expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier and the Kansas Workers Compensation Fund to be paid as follows:

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| Appino & Biggs Reporting Service | |
| Deposition of John P. Gravino | Unknown |
| Deposition of Ruth Hargett | \$416.00 |
| Deposition of Kenneth Hargett | \$150.05 |

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| Gene Dolginoff Associates, LTD | |
| Deposition of Nathan Shechter, M.D. | \$368.60 |
| Deposition of Michael Dreiling | \$436.50 |
| Metropolitan Court Reporters, Inc. | |
| Deposition of Ed Gaddis | Unknown |
| Deposition of Ed Takacs, M.D. | \$338.75 |
| Deposition of Gary Meyer | \$323.27 |
| Statutory Special Administrative Law Judge Fee | \$150.00 |

The deposition of Kenneth Hargett taken September 21, 1995, is not a part of the record and was not considered by the Appeals Board in granting this award. The cost of \$126.80 assessed as a result of that deposition shall be the responsibility of the claimant.

Pursuant to the stipulation of the parties, the Kansas Workers Compensation Fund shall be responsible for 25 percent of this award including all costs, medical expenses, and fees with the exception of the September 21, 1995, deposition of Kenneth Hargett.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Timothy G. Lutz, Overland Park, KS
Patrick M. Salsbury, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director